



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MGE/162923

The attached proposed decision of the hearing examiner dated March 24, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

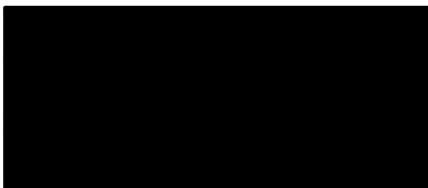
Pursuant to a petition filed December 29, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Fond Du Lac County Department of Social Services in regard to Medical Assistance, a telephonic hearing was held on February 05, 2015, at Fond Du Lac, Wisconsin. At the request of the parties, the record was held open until February 19, 2015 for the submission of petitioner's brief to DHA, until March 5, 2015 for the county agency's responsive brief to DHA, and March 12, 2015 for the petitioner's reply brief to DHA. Those consecutive briefs are received into the hearing record. The county agency declined to submit any further reply to the petitioner's reply brief.

The issue for determination is whether the county agency correctly denied the petitioner's September 30, 2014 Family Care Program Waiver application due to divestment of a life estate valued at \$57,972.80 during the penalty period of September 30, 2014 to May 25, 2015.

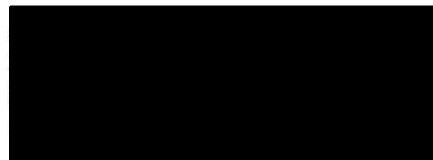
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Debra Gohlke, ESS

Fond Du Lac County Department of Social Services
50 N Portland St
Fond Du Lac, WI 54935

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 77 year old resident of Fond Du Lac County.
2. On May 23, 2005, petitioner signed a Quit Claim Deed to her homestead property ([REDACTED]) as grantor to her four children as grantees, [REDACTED] as joint tenants. See Exhibit 3. That Quit Claim deed was filed and recorded on June 27, 2005 at the Fond du Lac Register of Deeds. That Quit Claim Deed included the following restrictive language in pertinent part: “. . . Grantor, reserves to herself the right to the use and occupancy of the premises until the first to occur of the following events: 1) the death of the Grantor, or 2) at such time as the Grantor fails to occupy said real estate as her principal residence for an uninterrupted period of one hundred twenty (120) days. If at any time the Grantor is institutionalized in a nursing home or medical institution and requires care for which payment could be made by a Medicaid program or any other similar federal, state or local program, then the Grantor’s right to use and occupancy of the premises shall not include the right to collect rent therefrom. During such time as the Grantor uses and occupies the premises, Grantor shall not be required to pay any rent with respect to the use and occupancy of the premises. Grantor shall be responsible for all costs of the care, upkeep and maintenance of the premises, including but not limited to, all taxes, sewer charges and assessments of every kind that may be charged against the property; repairs, maintenance, replacement and fixtures or other capital improvements. Grantor shall be responsible for the payment of all utilities with respect to Grantor’s use and occupancy of the premises, including but not limited to, gas, heat, water, electricity and telephone . . .” See Exhibit 5.
3. On June 18, 2013, petitioner signed a Warranty Deed to her now non-homestead property [REDACTED] as grantor to her four children as grantees, [REDACTED] as joint tenants. See Exhibit 6. That Warranty deed was filed and recorded on July 1, 2013 at the Fond du Lac Register of Deeds. An attachment to that Deed states that the signing and recording of the deed evidences that her “life estate has been terminated.”
4. At least 120 days prior to the June 18, 2013 Warranty Deed, petitioner was no longer occupying the property in question, was residing in residential care, and had no intention of returning to the premises. See Exhibit 6, Warranty Deed.
5. On or about September 30, 2014, petitioner applied for Family Care Waiver Medical Assistance benefits.
6. The county agency sent a November 6, 2014 Negative Notice to the petitioner stating that her September 30, 2014 application for Medicaid had been denied due to divestment. See Exhibit 1. That notice stated that the agency had determined that petitioner divested \$57,972.80 by cancelling her life estate and not being paid out the remainder value of her life estate. The divestment penalty period began September 30, 2014 and ended May 25, 2015.
7. Consecutive briefs were sent to DHA (and exchanged between the parties), as explained in the above Preliminary Recitals.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf “disposes of resources at less than fair market value” **within five years** of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). A **life estate** is not considered an asset, but the proceeds from the sale of a life estate are. Wis. Admin. Code, § DHS 103.06(6). A person who terminates her life interest in a property without receiving the value of the life estate commits a divestment. *Medicaid Eligibility Handbook*, 17.10.1. The value of a life estate is determined by multiplying the entire value of the property by a fraction that depends upon the person’s age when the life estate is divested. *Id.*

If a person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is indicated in the *Medicaid Eligibility Handbook*, § 17.5.2.2.

During the February 5, 2015 hearing and in its February 26, 2016 brief, the county representative, ESS Debra Gohlke, argued that the county agency correctly denied the petitioner’s September 30, 2014 Family Waiver MA application due to divestment. See Exhibit 1. The agency further asserted that: a) it correctly determined that petitioner divested \$57,972.80 by cancelling her life estate and not being paid out the remainder value of her life estate; and b) the petitioner’s divestment penalty period began September 30, 2014 and ended May 25, 2015.

However, petitioner’s representative, [REDACTED] responded that the county agency incorrectly determined a divestment because: a) petitioner never held a life estate in the alleged divested asset, and as a result could not have divested the same; and b) the Department has failed to prove the existence of any life estate interest for the petitioner which thus rendered null the November 6, 2014 notice denying petitioner’s Family Care application due to divestment of such alleged life estate interest.

The issue as to whether petitioner held a life estate is easily answered by Exhibit 6. The Warranty Deed stated:

The purpose of this Deed is to evidence the completion of a condition precedent contained in a Quit Claim Deed dated May 23, 2005 as to the Grantor, [REDACTED] failure to occupy the premises for an uninterrupted period of 120 days indicating that her *interest* and the right to use and occupy the premises would be terminated . . . and that the signing and recording of this Deed evidences the same and that *said life estate* has been terminated. (Emphasis added)

[REDACTED] explained that the Deed was intended solely to clear title to the property to facilitate the sale by her children. Yes, it was to evidence that her prior life estate interest had been extinguished.

[REDACTED] makes much of the descriptions of a life estate in the administrative code and the *Medicaid Eligibility Handbook*. Per DHS 103.06(6), “life estate” means a claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including income from the property in his or her life.” Per *Medicaid Eligibility Handbook*, 17.10.1, a “life estate” is created when a property holder transfers ownership of the property to someone else and retains the right to live on the property and the income from it. (Emphasis added). He therefore argues that because petitioner did not reserve the right to collect rent the property interest she retained was not a life estate.

I will first point out that she relinquished a right to income only if she became institutionalized, not for every circumstance under which she might charge and collect rent. Income was not denied her had she continued to reside in the premises or if she had a break in occupancy of less than 120 uninterrupted days. I have to wonder if the odd provision of denying her a right to income only upon Medicaid-paid institutionalization was to set up the very argument made in this case and not because she intended to retain anything less than a life estate. The argument also turns an example of a benefit that might accrue to a life tenant (“use of the property including income”) into the definition of the property interest itself. There is no reason to read DHS 103.06(6) and the MEH as making the right to income the determinant as to whether a life estate exists. A life estate under Medicaid is no different than any other life estate.

I conclude that the Quit Claim deeded her interest in the property to her children while retaining for the duration of her life or continuous non-occupancy¹ the right to rent-free use and occupancy including income under all circumstances but one (institutionalization) and the obligation to pay the costs of that use, occupancy and upkeep. Petitioner had a life estate that extinguished without the payment to her of its fair market value. As such, petitioner divested that resource.

CONCLUSIONS OF LAW

The county agency correctly denied the petitioner’s September 30, 2014 Family Care Program Waiver application because of petitioner’s divestment of her life estate.

THEREFORE, it is

ORDERED

That the petition for review is herein dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as “PARTIES IN INTEREST”. Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.


¹ The fact that her interest could extinguish before her death does not mean her retained interest was not a life estate. An estate for life can be created subject to a special limitation. See, Restatement (First) of Property § 18; POMS Manual SI 01140.110 A. 6.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 15th day
of July, 2015.

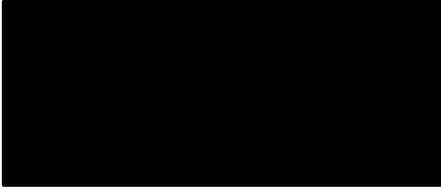

Thomas J. Engels, Deputy Secretary
Department of Health Services



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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED DECISION

MGE/162923

PRELIMINARY RECITALS

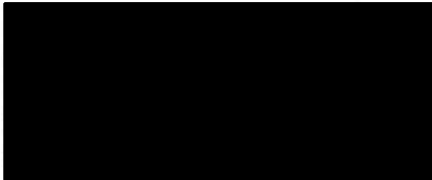
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The issues for determination are: a) whether the county agency correctly denied the petitioner's September 30, 2014 Family Care Program Waiver application due to alleged divestment of a life estate valued at \$57,972.80 during the penalty period of September 30, 2014 to May 25, 2015; and b) whether the county agency correctly established that petitioner legally retained a "life estate" interest in her property.

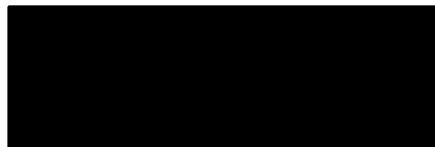
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Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Debra Gohlke, ESS

Fond Du Lac County Department of Social Services
50 N Portland St
Fond Du Lac, WI 54935

ADMINISTRATIVE LAW JUDGE:
 Gary M. Wolkstein
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 77 year old resident of Fond Du Lac County.
2. On May 23, 2005, petitioner signed a Quit Claim Deed to her homestead property ([REDACTED]) as grantor to her four children as grantees, [REDACTED] as joint tenants. See Exhibit 3. That Quit Claim deed was filed and recorded on June 27, 2005 at the Fond du Lac Register of Deeds. That Quit Claim Deed included the following restrictive language in pertinent part: “. . . Grantor, reserves to herself the right to the use and occupancy of the premises until the first to occur of the following events: 1) the death of the Grantor, or 2) at such time as the Grantor fails to occupy said real estate as her principal residence for an uninterrupted period of one hundred twenty (120) days. If at any time the Grantor is institutionalized in a nursing home or medical institution and requires care for which payment could be made by a Medicaid program or any other similar federal, state or local program, then the Grantor’s right to use and occupancy of the premises shall not include the right to collect rent therefrom . . .” See Exhibit 5.
3. On June 18, 2013, petitioner signed a Warranty Deed to her now non-homestead property ([REDACTED]) as grantor to her four children as grantees, [REDACTED] as joint tenants. See Exhibit 6. That Warranty deed was filed and recorded on July 1, 2013 at the Fond du Lac Register of Deeds.
4. At least 120 days prior to the June 18, 2013 Warranty Deed, petitioner was no longer occupying the property in question, was residing in residential care, and had no intention of returning to the premises. See Exhibit 6, Warranty Deed.
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A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf “disposes of resources at less than fair market value” **within five years** of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). A **life estate** is not considered an asset, but the proceeds from the sale of a life estate are. Wis. Admin. Code, § DHS 103.06(6). A person who terminates her life interest in a property without receiving the value of the life estate commits a divestment. *Medicaid Eligibility Handbook*, 17.10.1. The value of a life estate is determined by multiplying the entire value of the property by a fraction that depends upon the person’s age when the life estate is divested. *Id.*

If a person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is indicated in the *Medicaid Eligibility Handbook*, § 17.5.2.2.

The Wisconsin Administrative Code provides in pertinent part regarding “life estate” the following:

103.06(6), LIFE ESTATE. The applicant or recipient may hold a life estate without affecting eligibility for MA. If the property or the life estate is sold, any proceeds received by the applicant or recipient shall be considered assets. In this subsection, “life estate” means a claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including the **income** from the property in his or her lifetime. (Emphasis added).

The *Medicaid Eligibility Handbook* provides in pertinent part regarding “life estates:”

17.10.1 Life Estates Introduction

A life estate is created when a property holder transfers ownership of the property to someone else and retains the right to live on the property and the **income** from it. The new owner of the property is referred to as the remainder person. (Emphasis added).

Because s/he no longer owns the property the life estate holder does not have the right to sell or dispose of the property. Because s/he can’t sell or dispose of the property it is not counted as an available asset to the life estate holder. If the remainder person applied for EBD Medicaid and did not live in the home, the property, minus the value of the life estate, would be counted as an available asset to him or her (the remainder interest).

The value of the life estate is also not considered an available asset to the life estate holder.

If the property holder transferred the property to the remainder person for less than fair-market-value (*FMV*), a divestment has occurred. The *divested amount* is the FMV of the property at the time of the transfer minus the life estate value. To find the life estate value, multiply the FMV of the property by the number from the 39.1 Life Estate and Remainder Interest table which corresponds to the age of the life estate holder at the time the property was transferred.

Note: Property tax assessments can be used to determine a property’s FMV if both the local agency and *applicant member* agree that it accurately represents the price it would sell for on the open market in that geographic area. If both parties do not agree, statements from one or more realtors could be sufficient. If the local agency requests a comparative analysis, they are required to pay for it. Regardless of what process is used, the member always has the right to appeal the agency decision if they think it is incorrect.

There can also be divestment if the life estate is terminated and the life estate holder is not paid for the value of the life estate. To calculate the divested amount multiply the

FMV of the property at the time the life estate was terminated by the number from the 39.1 Life Estate and Remainder Interest table which corresponds to the age of the life estate holder at the time the life estate was terminated.

During the February 5, 2015 hearing and in its February 26, 2016 brief, the county representative, ESS Debra Gohlke, argued that the county agency correctly denied the petitioner's September 30, 2014 Family Waiver MA application due to divestment. See Exhibit 1. The agency further asserted that: a) it correctly determined that petitioner divested \$57,972.80 by cancelling her life estate and not being paid out the remainder value of her life estate; and b) the petitioner's divestment penalty period began September 30, 2014 and ended May 25, 2015.

However, petitioner's representative, [REDACTED] responded convincingly that the county agency incorrectly determined a divestment because: a) petitioner never held a life estate in the alleged divested asset, and as a result could not have divested the same; and b) the Department has failed to prove the existence of any life estate interest for the petitioner which thus rendered null the November 6, 2014 notice denying petitioner's Family Care application due to divestment of such alleged life estate interest.

[REDACTED] provided two definitions of a "life estate." Per DHS 103.06(6), "life estate" means a claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including income from the property in his or her life." (Emphasis added). Per Medicaid Eligibility Handbook, 17.10.1, a "life estate" is created when a property holder transfers ownership of the property to someone else and retains the right to live on the property and the income from it." (Emphasis added).

[REDACTED] argued that in this case no life estate was established because the 2005 Quit Claim Deed language placed material restrictions on petitioner's retained use of the property: a) the petitioner did not have a right to income for her lifetime because petitioner right to income would cease at the time of her being institutionalized in a nursing home or medical institution. See Finding of Fact #2 above. Petitioner correctly argued that when a Grantor does not retain a lifetime entitlement to income, no life estate exists, and petitioner did not possess such lifetime entitlement to income based upon the declared limitation stated on the May 23, 2005 Quit Claim Deed. Exhibit 3. The county agency was unable to provide any legal or policy authority to refute the petitioner's argument that petitioner did not legally possess a "life estate" in the property to establish any divestment by petitioner.

While the county agency's "interpretation" that a "life estate" was formed by petitioner was understandable, the county agency representative was unable to refute the petitioner's legal argument of lack of legal establishment of petitioner's "life estate" during the hearing or in its responsive brief, as explained above. The county agency also questioned if no life estate was formed, why did the petitioner file a June 18, 2013 Warranty Deed to transfer the petitioner's property as grantor to her children, as joint tenants. In his Reply brief, [REDACTED] explained that the central reason for the Warranty Deed was to assist petitioner's four children who owned the property with their efforts to sell the property and to convey clear title to the property in order to facilitate the sale by the petitioner's children. The county agency did not send any response to the petitioner's Reply Brief. As a result, the county agency was unable to classify any other form of interest retained by petitioner or place any calculation on any other form of interest in the property which established that petitioner committed a divestment. Accordingly, based upon the above, I conclude that the county agency incorrectly denied the petitioner's September 30, 2014 Family Care Program Waiver application because the agency failed to establish a divestment because the county agency failed to establish that petitioner retained a "life estate."

CONCLUSIONS OF LAW

1. The county agency incorrectly denied the petitioner's September 30, 2014 Family Care Program Waiver application because the agency failed to establish a divestment because the county agency failed to establish that petitioner retained a "life estate."
2. The county agency did not establish with any evidence that it correctly denied the petitioner's September 30, 2014 Family Care Program Waiver application, due to some proper reason other than the petitioner's alleged life estate divestment of the property.

THEREFORE, it is**ORDERED**

If this Proposed Decision is adopted as the Final Decision by the Secretary of the Department, then this matter is remanded to the county agency with instructions to certify the petitioner as eligible for Family Care (FC) Waiver benefits retroactive to petitioner's September 30, 2014 FC application, within 10 days of the date of this Decision.

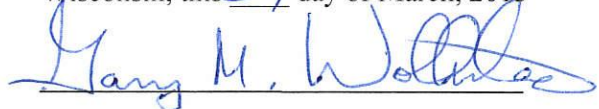
NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 24 day of March, 2015



Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals